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The Dismantling of Affirmative Action Programs: Evaluating City of Richmond v. J.A. Croson Co.

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THE DISMANTLING OF AFFIRMATIVE ACTION PROGRAMS: EVALUATING *CITY OF RICHMOND v. J.A. CROSON CO.*

by Dianne E. Dixon*

I. INTRODUCTION

As a tribute to the 25th anniversary of the enactment of the Civil Rights Act of 1964,[1] the conservative majority of the United States Supreme Court struck down, in *City of Richmond v. J.A. Croson Co.*,[2] a Richmond, Virginia, set-aside program for minority contractors as violative of the fourteenth amendment's equal protection clause.[3] The decision represents a profound departure from the Court's prior stance regarding affirmative action programs because it constitutes the first time a majority of the Court has held that race-based remedial governmental programs are subject to a strict scrutiny standard of review under the equal protection clause.[4] The anxiety felt by civil rights activists over this decision is both widespread and justified given that such a high standard of review has usually proven to be "'strict' in theory and fatal in fact."[5]

II. THE FACTUAL BACKGROUND

A. The Set-Aside Plan

In April 1983, the Richmond City Council (the Council) began the

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1. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 1971, 1975 to 1975d, 2000a to 2000d-4, 2000e to 2000h-6 (1988)).

2. 109 S. Ct. 706 (1989).

3. *Id.* at 730. *See also* U.S. CONST. amend. XIV, § 1.

4. *Croson*, 109 S. Ct. at 721 (O'Connor, J., plurality opinion); *id.* at 734 (Kennedy, J., concurring); *id.* at 735 (Scalia, J., concurring).

5. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 362 (1978) (Brennan, White, Marshall and Blackmun, JJ., concurring in part and dissenting in part) (quoting Gunther, *The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

Minority Business Utilization Plan (the Plan) which required prime contractors, who were awarded construction contracts, to subcontract 30% or more of the dollar amount of the contract to minority business enterprises (MBEs).[6] The Plan contained a waiver provision of the 30% set-aside for any prime contractor who could show that he made a good faith effort to comply with the requirement but that qualified MBEs were "unavailable or unwilling to participate in the contract."[7] The final determination of all waivers was decided by the city's Director of General Services because the Plan contained no provision for an administrative appeal.[8]

The Plan, which was to expire five years after its inception, was declared "'remedial' in nature, and enacted 'for the purpose of promoting wider participation by minority business enterprises in the construction of public projects.'"[9] At the time that the Plan was adopted, minority group members constituted half of Richmond's population, yet minority contractors received less than 1% (.67%) of total city contracting dollars.[10] The 30% set-aside would have increased to 3% the total amount of city contracting dollars which MBEs would receive.[11]

B. The *Croson* Facts

In September, 1983, the city of Richmond invited contractors to bid on a project in which they would provide and install plumbing fixtures for the city jail.[12] J.A. Croson (Croson), a mechanical plumbing and heating contractor who decided to bid on the contract, determined that it would have to subcontract the provisions of the fixtures to a minority contractor in order to ensure compliance with the 30% MBE set-aside.[13]

Only one of the MBEs that Croson contacted, Continental Metal Hose (Continental), expressed any interest in participating in the project.[14] However, Continental had to obtain a price quotation for the

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6. *Id.* at 712-13.

7. *Id.* at 713.

8. *Id.* However, under the city's procurement policies, a general right of protest was available. *Id.* (citing Richmond, Va., Code, § 12-126(a) (1985)).

9. *Id.* (quoting Richmond, Va., Code, § 12-158(a)).

10. *Id.* at 714.

11. *Id.* at 715.

12. *Id.* (the project involved the installation of stainless steel urinals and water closets in the city jail and specified the use of two manufacturers' fixtures).

13. *Id.* (the provision of the fixtures amounted to 75% of the total contract price).

14. *Id.*

fixtures before it could submit its bid to Croson.[15] Continental contacted one supplier who had already given Croson a low bid on the fixtures and so refused to quote Continental on the same project.[16] Another supplier, one of the two manufacturers of the fixtures specified in the contract, refused to quote a price until it had obtained a credit check on Continental, which was expected to take a minimum of 30 days to complete.[17] The sealed bids for the city were due on October 12, 1983, less than thirty days away.[18] Thus, when Croson submitted its bid to the city, it had not yet received Continental's bid on the fixtures.[19]

When the bids were opened on October 13, 1983, Croson's was the lowest.[20] Six days later, still without a bid from Continental, Croson submitted a waiver request to the city's procurement office.[21] When Continental learned of Croson's waiver request, it contacted the second of the two manufacturers specified in the contract and, shortly thereafter, informed the city procurement office that it could supply the fixtures.[22] Continental then submitted a bid to Croson which was $6,183.29 higher than the price Croson had included in its bid to the city.[23]

On November 2, 1983, Croson's waiver request was denied and Croson was given ten days to comply with the MBE provision.[24] Croson responded by arguing for either a waiver of the MBE requirement or authorization to raise the contract price of the project.[25] The city rejected both requests and informed Croson that the project was going to be re-bid.[26] Rather than file a protest, Croson sued the city arguing that

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15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* (Croson's bid contained its own estimate of how much the fixtures would cost).

20. *Id.*

21. *Id.* (the waiver request stated that Continental was "unqualified" for the project and that other MBEs "had been unresponsive or unable to quote" a price for the fixtures).

22. *Id.*

23. *Id.* (after adding in the costs of bonding and insurance, the cost of using Continental as a subcontractor for the project would have raised Croson's bid to $7,663.16).

24. *Id.*

25. *Id.* at 715-16. Croson also explained in its response to the city's procurement office that Continental's quotation was much higher than any other quotation received by them. *Id.* at 715.

26. *Id.* at 716.

the set-aside program was unconstitutional.[27]

The district court found the Plan constitutional and the Court of Appeals for the Fourth Circuit affirmed.[28] Subsequently, the United States Supreme Court decided *Wygant v. Jackson Board of Education*,[29] which also involved an equal protection challenge to a race-conscious remedial plan.[30] On Croson's petition for *certiorari*, the Supreme Court vacated the Fourth Circuit's decision and "remanded the case for reconsideration in light of *Wygant*."[31] On reconsideration, the Fourth Circuit reversed the district court.[32] Applying a standard of strict scrutiny, the Fourth Circuit held that the Plan violated the fourteenth amendment's equal protection clause because it was neither justified by a compelling governmental interest nor narrowly tailored to accomplish its purported remedial purpose.[33] On appeal by the city of Richmond, the Supreme Court affirmed.[34]

III. THE UNITED STATES SUPREME COURT DECISION

The *Croson* decision is severely fragmented. The opinion, written by Justice O'Connor, contains six sections, three of which garnered support by a majority of the Court, two of which were supported by a plurality, and one section in which only two other justices joined.[35]

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27. *Id.* Croson brought the suit in the United States District Court for the Eastern District of Virginia. *Id.*

28. J.A. Croson Co. v. City of Richmond, 779 F.2d 181, 194 (4th Cir. 1985).

29. 476 U.S. 267 (1986).

30. *See id.* (Powell, J., plurality opinion). The Court in *Wygant* held that a race-conscious plan designed to prevent the layoff of minority teachers with less seniority than nonminorities in order to maintain a racially integrated workforce was unconstitutional. *Id.* In applying a strict scrutiny analysis to the layoff plan, which had been agreed to by both the school board and the local teacher's union, the plurality further noted that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.* at 276.

31. J.A. Croson Co. v. City of Richmond, 478 U.S. 1016 (1986).

32. J.A. Croson Co. v. City of Richmond, 882 F.2d 1355 (4th Cir. 1987).

33. *See id.* at 1360.

34. *Croson*, 109 S. Ct. at 730.

35. *Id.* at 712. The majority consisted of O'Connor, J., and Rehnquist, C.J., and White, Stevens, Kennedy and Scalia, JJ. However, Scalia, J., joined in the judgment and, like Kennedy and Stevens, JJ., also wrote a separate concurrence. *Id.* Marshall, J., wrote a dissenting opinion in which Brennan and Blackmun, JJ., joined. *Id.* Blackmun, J., also wrote a separate dissent in which Brennan, J., joined. *Id.* Section I of the opinion, although joined in by a majority of the court, merely recites the facts, thus, it will not be discussed in further detail. *See id.* at 713-17.

A. The Majority Opinion

Section III-B of the opinion criticized Richmond's set-aside plan as being unsupported by any evidence of past discrimination.[36] According to the majority, the city of Richmond failed to demonstrate a compelling interest in its adoption of the Plan beyond a "generalized assertion" that there had been past discrimination in the entire construction industry.[37] As a result, the plan was found to have "no logical stopping point" and the 30% set-aside figure was deemed to have been arbitrarily chosen, bearing no relation to any identifiable past discrimination.[38] The majority believed that the Richmond City Council could have used any percentage for the set-aside because the evidence on which the Council relied in drafting the Plan provided no guidance in determining the precise scope of the injury the Council sought to remedy.[39]

Section IV attacked the plan for not being sufficiently tailored to achieve its stated remedial purpose.[40] The Council was faulted for not having considered race-neutral alternatives[41] and for using a "rigid numerical quota," rather than deciding on a case-by-case basis whether a particular MBE had suffered from the effects of past discrimination.[42] The 30% figure was specifically assailed by the majority as constituting "outright racial balancing" and "rest[ing] upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population."[43]

B. The Standard of Strict Scrutiny

Section III-A of the opinion declared that the appropriate standard

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36. *Id.* at 723-25.

37. *Id.* at 724. The Court acknowledged the widespread effects of discrimination but reasoned that "[w]hile there is no doubt that the sorry history of both private and public discrimination has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota." *Id.* The Court went on to find that none of the City's findings provided them "with a 'strong basis in evidence for its conclusion that remedial action was necessary.'" *Id.* (quoting Wygant v. Jackson Board of Education, 476 U.S. 267, 277 (1986) (Powell, J., plurality opinion)).

38. *Id.* at 723-24.

39. *Id.* at 723.

40. *Id.* at 728-29.

41. *Id.* at 728.

42. *Id.*

43. *Id.* (citing Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part)).

of review applicable to racial classifications under the equal protection clause of the fourteenth amendment is one of strict scrutiny.[44] Thus, to survive an equal protection challenge, a majority of the Court agreed that a state must: 1) demonstrate a compelling interest justifying its use of race based legislation; and 2) show that the legislation is narrowly tailored in achieving this stated purpose.[45] Where the plurality and the concurrences differ is in determining when a state has *not* met this burden.

To pass muster under the plurality's strict scrutiny test, race-based legislation must be adopted for the purpose of eradicating the effects of past discrimination as evidenced by judicial, legislative, or administrative findings of constitutional or statutory violations.[46] Justice O'Connor's opinion requires that racial classifications be strictly reserved for remedial settings to avoid promoting the perception of racial inferiority and creating a climate of racial hostility.[47] However, the Court drew a line at those instances where a government seeks to remedy "societal discrimination."[48] The use of race-conscious measures for this purpose is deemed to be inappropriate, being too broad in scope to provide a basis for determining the magnitude of the injury being remedied.[49]

Justice Stevens in his concurrence disagreed, declaring that race-based legislation does not always have to be remedial in nature, but rather, may be legitimate where it seeks to "produce tangible and fully justified future benefits [for the public] . . . ."[50] He found this interest more compelling than one of remedying past discrimination because he believed that courts are better equipped than legislatures to identify past wrongdoers and fashion remedies which will appropriately redress the

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44. *Id.* at 721-22 (O'Connor, J., plurality opinion). "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial.'" *Id.* at 721.

45. *Id.* Section III-A of Justice O'Connor's opinion is joined by Chief Justice Rehnquist, and White and Kennedy, JJ. *Id.* at 712.

46. *Id.* at 721. Although Section III-A is only joined by a plurality of the Court, the positions of the concurrences by Justices Stevens and Scalia create, for the first time, a majority of the Court in adopting this standard of review. *See id.* at 730 (Stevens, J., concurring) (rather than debate the standard of review to use, the Court should "identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment"; however, Stevens, J., in effect applies strict scrutiny); *id.* at 735 (Scalia, J., concurring) ("I agree with much of the Court's opinion, and, in particular, with its conclusion that strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is 'remedial' or 'benign.'").

47. *Id.* at 727.

48. *Id.*

49. *Id.*

50. *Id.* at 730 n.1 (Stevens, J., concurring) (citations omitted).

wrongs committed.[51] For Justice Stevens, the proper equal protection inquiry in cases challenging racial classifications focuses upon identifying the characteristics of the classes advantaged and disadvantaged by the legislation to determine whether their disparate treatment serves some overall public benefit.[52]

Justice Scalia applied the strict scrutiny standard more narrowly than either Justice Stevens or the plurality.[53] According to Scalia, a state demonstrates a sufficiently compelling interest in using racial classifications in only those instances where it seeks to eliminate its own maintenance of a system of unlawful racial discrimination.[54] Once that system is dismantled, Scalia stated, that the government is under "no further obligation to use racial re-assignments to eliminate [the] continuing effects" of the prior discrimination.[55]

C. The Power of the Government to Remedy Discrimination

In Section II of the opinion Justice O'Connor argued that under the fourteenth amendment Congress possesses broader powers than the states to employ race-conscious remedial legislation.[56] Specifically, she declared, that because § 5 of the fourteenth amendment expressly authorizes Congress to enforce the equal protection guarantees of § 1, Congress is constitutionally mandated to use affirmative measures to ensure compliance.[57] When considering the states, Justice O'Connor defined the situation quite differently. Calling attention to § 1 of the amendment, Justice O'Connor reasoned that this section prohibits the states from denying equal protection guarantees to individuals within their jurisdictions and deemed it a restriction on state authority to enact race-conscious legislation.[58] Thus, according to Justice O'Connor, where Congress is constitutionally empowered to act under the fourteenth

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51. *Id.* at 731-32.

52. *Id.* at 732 & n.6 (relying on Cleburne v. Cleburne Living Center, 473 U.S. 432, 452-53 (1971)).

53. *Id.* at 735 (Scalia, J., concurring).

54. *Id.* at 737.

55. *Id.*

56. *Id.* at 718-19 (O'Connor, J., plurality opinion).

57. *Id.* at 719. "[T]he Thirteenth and Fourteenth Amendments . . . 'were intended to be, what they really are, limitations on the power of states and enlargements of the power of Congress.'" *Id.* (quoting *Ex Parte* Virginia, 100 U.S. 339, 345 (1880)). *See also* U.S. CONST. amends. XIII, XIV.

58. *Croson*, 109 S. Ct. at 719 (O'Connor, J., plurality opinion).

amendment, the states are constitutionally constrained from acting.[59]

In Section V, Justice O'Connor described further limitations on the ability of state and local governments to remedy discrimination.[60] She determined that these governments may adopt an affirmative action plan only in certain instances.[61] Although supported by only a plurality of the Court, this position represents a major departure from prior decisions which have held that affirmative action plans need not be based upon findings of discrimination against particular individuals to be legitimate.[62]

D. The Dissent

Justice Marshall, in his dissenting opinion, attacked the majority's application of strict scrutiny to affirmative action programs declaring that by employing the same standard of review to these remedial programs as that applied to invidious discrimination, the majority had relegated discrimination to "a phenomenon of the past."[63] He also argued that the majority's reasoning was flawed and unsupported by precedent.[64]

IV. DISCUSSION

The essence of the majority's position in *Croson* is that the Richmond set-aside plan is unsupported by sufficient proof of past racial

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59. *Id.*

60. *Id.* at 729-30.

61. These instances being where: 1) the plan will remedy the effects of discrimination against *identified* victims; and 2) no race-neutral alternative is available. *Id.* In part V of her opinion Justice O'Connor states that "[e]ven in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices . . . ." *Id.* This tends to reinforce her earlier observation that the city of Richmond, when enacting the plan, did not adequately explore the use of a race-neutral means as required. *Id.* at 728. "In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies . . . ." *Id.* (quoting United States v. Paradise, 480 U.S. 149, 171 (1987)).

62. *See, e.g.*, Wygant v. Jackson Board of Education, 476 U.S. 267, 277-78 (1986) (Powell, J., plurality opinion); *id.* at 286 (O'Connor, J., concurring); *id.* at 305 (Marshall, J., dissenting). "[A] remedial purpose need not be accompanied by contemporaneous findings of discrimination to be accepted as legitimate as the public actor has a firm basis for believing that remedial action is required." *Id.* at 286 (O'Connor, J., concurring) (citations omitted).

63. *Id.* at 752 (Marshall, J., dissenting).

64. *Id.* at 754 ("Nothing in the Constitution or in the prior decisions of this court supports limiting state authority to confront the effects of past discrimination to those situations in which a prima facie case of a constitutional or statutory violation can be made out.").

discrimination in the Richmond construction industry.[65] What is most disturbing about this position is that it has the effect of completely altering the nature of "acceptable" evidence in affirmative action challenges.[66] The Court dismissed outright, evidence which heretofore had been deemed probative in establishing the present day effects of past discrimination[67] and now seems to be requiring a more burdensome, and in some cases repetitious, factfinding process in which states and local governments must engage before adopting an affirmative action plan.[68]

The Court rejected Richmond's finding that racial discrimination had been and continued to be a problem in the construction industry nationwide.[69] Although the Council had before it an array of congressional and agency based studies, which documented the racially exclusive practices of businesses throughout the nation, the *Croson* majority disparaged the Council for relying on these findings.[70] The Court declared the evidence irrelevant and inconsequential, purportedly because the evidence failed to document the actual experiences faced by minority contractors in Richmond.[71] This was, to say the least, quite an unusual conclusion for the Court to reach given that many of these documents were the same reports on which Congress had relied when it passed the Public Works Employment Act of 1977.[72] Section 103(f)(2) of that Act was a minority set-aside provision which required state and local governments to award at least 10% of their federal grants to MBEs.[73] The Richmond plan was closely patterned on this Act.[74]

When the Public Works Employment Act set-aside plan was challenged in *Fullilove v. Klutznick*, the United States Supreme Court

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65. *Id.* at 724 (majority opinion).

66. *Cf.* Wygant v. Jackson Board of Education, 476 U.S. 267, 289 (1986) (O'Connor, J., concurring). *See supra* note 62 and accompanying text.

67. *Compare Croson*, 109 S. Ct. at 726 (Court dismissing as irrelevant congressional findings of nationwide discrimination in the construction industry) *with* Fullilove v. Klutznick, 448 U.S. 448, 477-78 (1980) (Court accepting as determinative these same findings in upholding an MBE set-aside plan).

68. *Croson*, 109 S. Ct. at 723-28.

69. *Id.* at 723 ("[A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body . . . .").

70. *Id.* at 724-27.

71. *Id.* "The probative value of these findings for demonstrating the existence of discrimination in Richmond is extremely limited." *Id.* at 726.

72. Pub. L. No. 95-28, 1977 U.S. CODE CONG. & ADMIN. NEWS (91 Stat.) 116 (codified as amended at 42 U.S.C. §§ 6701, 6706, 6707, 6709, 6710 (1988)).

73. *Id.* § 103(f)(2).

74. *Croson*, 109 S. Ct. at 712-13. The Plan required that 50% of all contracts be awarded to minorities. *Id.* at 713.

upheld the measure, pointing to the very same type of congressional studies as were relied upon in *Croson* as strong evidence of discrimination in the construction industry both nationwide and locally.[75] As the *Fullilove* Court observed, these congressional studies documented that there was a nationwide pattern of discrimination in the construction industry against minority businesses in the assignment of federal, state and local contracts.[76] Thus, it is difficult to understand how the *Croson* Court can declare that these same studies have "extremely limited" probative value on the issue of discrimination in the Richmond construction industry.[77]

In condemning Richmond's reliance on the congressional findings of discrimination, the majority in *Croson* declared that information cannot be shared from jurisdiction to jurisdiction.[78] The obvious result of this ruling is that it tremendously increases the expense of enacting voluntary governmental affirmative action plans and, consequently, decreases the incentive of these bodies to do so. Furthermore, no one argues against the fact that each state must engage to some degree in its own independent fact-finding before adopting an affirmative action plan. The city of Richmond had held a series of hearings to do just that, nevertheless, the Court rejected this evidence deeming that it, like the congressional findings, lacked probative value on the issue of actual discrimination in the Richmond construction industry.[79] This dismissal squarely contradicts

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75. *See* Fullilove v. Klutznick, 448 U.S. 448, 477-78 (1980) (Burger, C.J., plurality opinion).

> With respect to the MBE provision, Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination. . . . Although much of this history related to the experience of minority businesses in the area of federal procurement, there was direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect to state and local construction contracting as well.

Id.

76. *Id.* at 478.

77. *Croson*, 109 S. Ct. at 726.

78. *See id.* at 727 ("It is essential that State and local agencies also establish the presence of discrimination in their own bailiwicks. . . .") (quoting Days, *Fullilove*, 96 YALE L.J. 453, 480-81 (1987)).

79. *Id.* at 724.

precedent and common sense.[80]

For example, the Council heard testimony that the major Richmond area construction trade associations had virtually no minorities among their hundreds of members.[81] Although representatives from several of the construction trade associations denied that their organization engaged in discrimination, none controverted these statistics.[82] These associations are vital networking operations, helping members procure business.[83] The fact that these organizations had few minority members was very telling on the ability of minority businesses to succeed in Richmond and the existence of racial exclusion in the Richmond construction industry.[84] Yet, the Court found this evidence not probative of discrimination.[85]

Additionally, the Council had before it evidence that, although 50% of the city's population was black, less than 1% of the city's construction contracting dollars had gone to minority prime contractors in the five years preceding the adoption of the set-aside plan.[86] The Court disparaged the Council's reliance on this data as misplaced.[87] According to the Court, such disparities may be probative of a pattern of discrimination when the positions at issue are entry level positions or require minimal training, "[b]ut where special qualifications are necessary, the relevant statistical pool for the purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task."[88] Thus, the Court reasoned, the proper

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80. *See, e.g., Fullilove*, 448 U.S. at 478 (Burger, C.J., plurality opinion). *See also supra* notes 75-76 and accompanying text.

81. *Croson*, 109 S. Ct. at 726.

82. J.A. Croson Co. v. City of Richmond, 779 F.2d 181, 189 (4th Cir. 1985). The circuit court noted that in all the hearings before the city council no opposing witness or member of the council denied or argued against the finding that discrimination was widespread within all facets of the City's construction industry. *Id.*

83. *Croson*, 109 S. Ct. at 724. Some of these trade associations consist of all white membership.

84. *Id.* at 726.

85. *Id.* ("[S]tanding alone this evidence is not probative of any discrimination in the local construction industry.").

86. *Id.* at 714 (the exact percentage of contracts awarded to minority business enterprises was .67%).

87. *Id.* at 725 ("Reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the city of Richmond is . . . misplaced.").

88. *Id.* (citing Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977); Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 651-52 (1987) (O'Connor, J., concurring)).

comparison which the Council should have made was between the number of qualified MBEs, those capable of performing the city contracts, and the percentage of city contracting dollars these businesses received.[89]

Prior to *Croson,* it had been established that, where the issue was whether or not past discrimination had resulted in the continuing exclusion of minorities from an historically tight-knit industry, the contrast between population and workforce was entirely appropriate to help gauge the degree of the exclusion.[90] Indeed, in *Fullilove*, the Court found the disparity between the percentage of federal contracts awarded to minorities and the percentage of minorities in the general population to be significant because it documented "the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination . . . ."[91]

The standard of comparison articulated by the majority in *Croson* assumes that all things are equal between the races when it comes to establishing a construction business.[92] If this assumption were correct then perhaps it would have been more plausible for the Court to have declared that the relevant comparison for the purpose of proving past discrimination is between the number of qualified MBEs and the number of contracts awarded. However, as the statistics on membership in the trade associations highlight, that assumption was invalid.[93] Thus, it becomes necessary to gauge the degree to which past discrimination operated to prevent minorities from obtaining the experience they need to establish a construction business. This cannot be determined without comparing the number of minorities in the general population to the number of public contracts awarded.[94]

The other major area of attack by the Court concerned the set-aside plan itself.[95] After examining several factors, the Court decided that even if Richmond had demonstrated a compelling interest in adopting

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89. *Id.*

90. *See, e.g.*, Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616 (1987); United Steelworkers of Am., AFL-CIO v. Weber, 443 U.S. 193 (1979); Teamsters v. United States, 431 U.S. 324 (1977).

91. *Fullilove*, 448 U.S. at 478 (Burger, C.J., plurality opinion).

92. *Croson*, 109 S. Ct. at 725. The Court, in establishing the relevant labor pool comparison as being between those minorities present in the workforce and those in the general population qualified for the positions in question, proceeded under the incorrect assumption that the ability to acquire the necessary skills is equal for all races and ethnic groups. *Id.*

93. *Id.* at 726 ("The City [found] . . . evidence that MBE membership in local contractor associations was low.").

94. *See id.* at 746-47 (Marshall, J., dissenting).

95. *Id.* at 728-29 (majority opinion).

an affirmative action plan, such as eradicating the present effects of proven past discrimination, the plan that it had approved was not sufficiently narrowly tailored to address that interest.[96]

Justice O'Connor described the Plan as inflexible even though the Plan contained a waiver provision.[97] She dismissed the waiver provision because it focused on the availability of MBEs rather than actual victims of past discrimination.[98] According to Justice O'Connor's reasoning, any white general contractor desiring to do business with the city of Richmond should have been allowed to obtain a waiver from the 30% set-aside whenever an MBE failed to show that it had been an actual victim of past discrimination.[99] Once again, Justice O'Connor advocated a position which contradicts prior court rulings.[100] In *Wygant*, a majority of the Court expressly rejected the requirement that affirmative action plans be designed only to benefit specific victims of discrimination.[101] Such a requirement was deemed too onerous and unsupported by the Constitution.[102] Indeed, even Justice O'Connor agreed that "a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored,' or 'substantially related,' to the correction of prior discrimination by the state actor."[103]

The rationale against Justice O'Connor's position is the realization that discrimination, where it has been the pattern and practice of business, is not confined to isolated instances, but rather, disadvantages an entire group or class of people.[104] Under the majority view, discrimination would become, essentially, business as usual. By requiring a state to restrict its use of affirmative action plans to only those instances where specific victims of discrimination are involved, the fact that an entire group has been victimized will be wholly ignored.

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96. *Id.* at 729 ("We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination.").

97. *Id.* at 728-29.

98. *Id.* at 729 ("Unlike the program upheld in *Fullilove*, the Richmond Plan's waiver system focuses solely on the availability of MBE's; there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination . . . .").

99. *Id.*

100. *See, e.g.*, Wygant v. Jackson Board of Education, 476 U.S. 267, 289 (1985) (O'Connor, J., concurring).

101. *Id.*

102. *Id.* at 312 (Marshall, J., dissenting).

103. *Id.* at 287 (O'Connor, J., concurring).

104. *Id.* at 282-83.

The Court also criticized the Plan for requiring a set-aside of 30%.[105] According to the Court, this figure appeared to have been chosen arbitrarily, unrelated to the availability of MBEs, thus, constituting a "rigid racial quota."[106] This criticism is wholly without merit given that the Richmond figure was patterned on the *Fullilove* precedent.[107] As Justice Powell noted in *Fullilove*, Congress' 10% figure fell "roughly halfway between the present percentage of minority contractors and the percentage of minority group members in the nation."[108] Similarly, Richmond's 30% figure fell roughly halfway between the present percentage of MBEs in Richmond and the percentage of minorities in Richmond.[109] To uphold Congress' finding of a halfway point between the percentage of minorities in jobs and the percentage of minorities in the general population while condemning the city of Richmond's similar action is hypocritical.

Moreover, restricting the numerical goal solely to the availability of MBEs without taking general population percentages into account, will foster the maintenance of the status quo; few minority business enterprises. If the development of more strong and viable MBEs is one of the goals of a set-aside plan, as both Congress and the Richmond City Council declared,[110] then the plan must be devised in a way which will encourage minority members in the general population to establish new MBEs. By setting a percentage which correlates the number of existing MBEs with the number of minorities in the general local population, a municipality creates an environment which encourages minorities to establish new MBEs. If, however, the set-aside percentage is set at the number of existing MBEs, then a municipality will create only enough business for those MBEs. The likelihood that other minorities would be encouraged to establish their own contracting businesses in an industry dominated by discrimination where non-discriminatory business opportunities are minimal is doubtful. Thus, the Richmond plan, like the *Fullilove* plan should not have been criticized for its set-aside goal.[111]

The Court also criticized the Plan for being overinclusive because it included Spanish-speaking, Oriental, Indian, Eskimo and Aleut persons

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105. *Croson*, 109 S. Ct. at 728.

106. *Id.* at 724.

107. *Id.* at 714. *See also* Fullilove v. Klutznick, 448 U.S. 448 (1980).

108. *Fullilove*, 448 U.S. at 513-14 (Powell, J., concurring).

109. *Croson*, 109 S. Ct. at 751 (Marshall, J., dissenting).

110. *Fullilove*, 448 U.S. at 459 (Burger, C.J., plurality opinion); *Croson*, 109 S. Ct. at 713.

111. *See Croson*, 109 S. Ct. at 751-52 (Marshall, J., dissenting).

within its definition of minority.[112] The Court stated that "[t]he random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond, suggests that perhaps the city's purpose was not in fact to remedy past discrimination."[113] Here, too, the Court appears to forget that the racial groups included in the Richmond plan are the very same racial groups included in the *Fullilove* plan.[114]

Finally, the Court attacked the Council for having employed race-conscious measures without first having considered race-neutral alternatives.[115] This criticism would have been valid were it not for the fact that Congress had already made findings that race-neutral remedies would not be effective in combatting discrimination in the construction industry.[116] It is unclear why the Court is requiring municipalities to ignore the findings of other jurisdictions, including Congress, no matter how relevant the information to the municipality.[117] Following the Court's rationale, Richmond should have gone through an expensive and time consuming process of employing race neutral measures which had already been proven ineffective before it adopted the set-aside plan.[118] This position is neither tenable nor supported by the Constitution.[119]

Little in the *Croson* majority opinion is supported by precedent or required by the Constitution. In fact, both precedent and the Constitution contradict the findings of the *Croson* court.[120] Politics rather than legal logic constitutes the only plausible explanation for the differing results in *Fullilove* and *Croson*. The Court that decided *Fullilove* in 1980 was not the

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112. *Id.* at 727-28 (majority opinion). Justice O'Connor concluded that "[t]here [was] *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Eskimo, or Aleut persons in any aspect of the Richmond construction industry." *Id.* (emphasis in original).

113. *Id.* at 728.

114. *See Fullilove*, 448 U.S. at 454 (Burger, C.J., plurality opinion); *Croson*, 109 S. Ct. at 713. The congressional plan involved in *Fullilove* also included Spanish-speaking persons, Orientals, Indians, Eskimos and Aleuts. *Fullilove*, 448 U.S. at 459 (Burger, C.J., plurality opinion). It is worthy to note that in *Fullilove* Congress, like the Richmond City Council, had no specific evidence pointing to any discrimination against these particular groups and relied solely upon the disparity in statistics between the general percentage of MBE's in the industry and the percentage of minorities in the general population. *Id.*

115. *Croson*, 109 S. Ct. at 728.

116. *Id.* at 751 (Marshall, J., dissenting) (citing *Fullilove*, 448 U.S. at 463-67 (Burger, C.J., plurality opinion)).

117. *Id.* at 749.

118. *Id.*

119. *Id.* at 750.

120. *Id.* at 754.

Court that decided *Croson* in 1989.[121] By the time that *Croson* was decided, Justice Powell, who concurred in the *Fullilove* judgment, had been replaced by Justice Kennedy.[122] The *Croson* court was overwhelmingly conservative and because affirmative action plans have never been viewed favorably by the politically conservative, it is not surprising that the Court ruled as it did.[123] This may also explain why the Court adopted a strict scrutiny standard of review for government sponsored affirmative action plans.[124]

In *Regents of the University of California v. Bakke*,[125] a majority of the United States Supreme Court agreed that, given the history of racial discrimination in this country, it was appropriate to allow admissions officers to use race as one positive factor when making their admissions decisions.[126] In doing so, the Court created a distinction between programs designed to discriminate on the basis of race and those designed to remedy the effects of past discrimination on the basis of race.[127] Such a distinction seems appropriate; affirmative action programs are neither designed nor intended to promote racial hatred and separatism.[128] Nor are these programs "drawn on the presumption that one race is inferior to another . . . ."[129] Rather, these programs employ racial classifications

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121. *Compare Fullilove*, 448 U.S. at 452 (Chief Justice Burger wrote the opinion of the Court in *Fullilove*, but he was not a member of the *Croson* Court) *with Croson*, 109 S. Ct. at 712 (Justice O'Connor wrote the majority opinion in *Croson*, but she was not part of the *Fullilove* Court).

122. *See Fullilove*, 448 U.S. at 452 (Powell, J., joined the opinion of the Court penned by Burger, C.J.); *Croson*, 109 S. Ct. at 712 (Kennedy, J., joined the "conservative" majority opinion penned by O'Connor, J.).

123. *See* Chemerinsky, *The Supreme Court, 1988 Term-Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 44 (1989).

124. *See Croson*, 109 S. Ct. at 721.

125. 438 U.S. 265 (1978) (Powell, J., plurality decision).

126. *Id.* at 319-20 & n.53. "Universities . . . may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose." *Id.* at 319 n.53. Justice Powell also expressed this view in part V-C of his opinion which announced the decision of a plurality of the Court. *Id.* at 320 (Part V-C of Justice Powell's opinion was joined by White, Brennan, Marshall and Blackmun, JJ., making a majority of the court on this issue).

127. *See, e.g., Fullilove*, 448 U.S. at 472 (Burger, C.J., plurality opinion) (where a remedial race based program passed by Congress was submitted to a lesser standard judicial scrutiny).

128. *See, e.g., id.* at 459 (the program in *Fullilove* was designed to stimulate MBE's in the industry involved).

129. *See Bakke*, 438 U.S. at 357 (Brennan, White, Marshall and Blackmun, JJ., concurring in part and dissenting in part).

solely for remedial purposes, seeking to counter the centuries of lawful racism perpetrated by this country.[130]

Given this distinction, it seems appropriate that a lesser standard of review than one of strict scrutiny should be adopted to analyze these programs. In *Bakke*, a plurality of the Court argued for the adoption of an intermediate standard of review.[131] Such a standard would, the plurality claimed, avoid the fatal effect that a strict scrutiny analysis would have on these remedial programs and also provide sufficient safeguard against their misuse under a rational basis analysis.[132] Justice Marshall reiterated this argument for an intermediate standard of review in his *Croson* dissent.[133] Justice O'Connor, writing for a plurality of the *Croson* Court, criticized the standard, determining that courts would find it difficult to recognize when a racial classification was being used for a remedial or an invidious purpose.[134]

To illustrate her point, Justice O'Connor noted that on the Richmond City Council a majority of the seats were held by blacks.[135] Thus, she declared that under "the circumstances of this case" a heightened level of scrutiny was necessary to ensure that the Council was not acting

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130. *See, e.g., Fullilove*, 448 U.S. at 461 (Burger, C.J., plurality opinion). During the passage of the congressional legislation involved in *Fullilove*, Representative Biaggi of New York noted that, without the provision which implemented the remedial plan, the legislation would "perpetuate the historic practices that have precluded minority business enterprises from effective participation in public contracting . . . ." *Id.* (quoting 123 CONG. REC. 5331 (1977) (statement of Rep. Biaggi)).

131. *Id.* at 356-62 (Brennan, White, Marshall and Blackmun, JJ., concurring in part and dissenting in part).

132. *Id.* Under the intermediate standard of review, an affirmative action plan would comport with the fourteenth amendment guarantees where: 1) racial classifications are not used to stereotype or stigmatize a politically powerless segment of society; 2) the plan would not restrict fundamental rights; and 3) the racial classifications would serve important governmental objectives and be substantially related to achievement of these objectives. *Id.* at 359.

133. *Croson*, 109 S. Ct. at 752 (Marshall, J., dissenting).

134. *Id.* at 721 (O'Connor, J., plurality opinion). Justice O'Connor declared that "[t]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Id.* at 722 (quoting Weinberg v. Wiesenfeld, 420 U.S. 636, 648 (1975)). Justice O'Connor also stated that "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.* at 721.

135. *Id.* at 722 (Justice O'Connor noted that five of the nine City Council seats were held by blacks).

to disadvantage whites when it enacted the set-aside plan.[136] Apparently, Justice O'Connor chose to ignore the fact that whites comprised 50% of the population in Richmond.[137] More importantly, she chose to overlook the fact that strict scrutiny has traditionally been applied only in those circumstances where a group has been declared a suspect class.[138] The "traditional indicia of suspectness" has required that courts consider whether a given group has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[139]

Justice O'Connor's implication that the white citizens of Richmond have been so victimized by racial discrimination as to warrant suspect status and require strict scrutiny of the Richmond set-aside plan, is the epitome of ignorance and/or insensitivity.[140] The history of racial discrimination against blacks in Richmond is well known.[141] Taking into account this history, the Richmond City Council's decision to adopt a set-aside plan, should be presumed to be remedial. Nevertheless, Justice Marshall did not advocate that such a presumption be given to legislation simply because a municipality asserts a remedial purpose.[142] Like the *Croson* majority, Marshall would require governments to produce satisfactory proof of past racial discrimination to support the claim that remedial legislation was necessary.[143] Unlike the majority, however, Justice Marshall would allow a trial court's evaluation of the government's evidence to proceed along the same lines as had been approved in prior decisions.[144]

The Court's decision to require the exacting strict scrutiny standard of review for affirmative action programs is wholly unnecessary to safeguard the interests of non-minorities who have enjoyed centuries of advantage from the legal subjugation of racial minorities.[145] Justice Marshall described it best when he observed:

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136. *Id.*

137. *Id.*

138. *See id.* at 753 (Marshall, J., dissenting).

139. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

140. *Croson*, 109 S. Ct. at 722.

141. *See id.* at 740 (Marshall, J., dissenting).

142. *Id.* at 747.

143. *Id.* at 745.

144. *Id.*

145. *Id.* at 753. Justice Marshall noted that "It cannot seriously be suggested that nonminorities . . . have any 'history of purposeful unequal treatment.'" *Id.* (quoting *Rodriguez*, 411 U.S. at 28).

> In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brute and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges. In constitutionalizing its wishful thinking, the majority today does a grave disservice not only to those victims of past and present racial discrimination in this Nation whom government has sought to assist, but also to this Court's long tradition of approaching issues of race with the utmost sensitivity.[146]

V. *CROSON'S* IMPACT

The most obvious result one can expect from *Croson* is an increase in the number of court cases challenging state sponsored affirmative action plans. To the extent that state and local governments relied on *Fullilove* in drafting their plans, they can expect a difficult battle. Given the heightened level of scrutiny and the evidentiary hurdles which *Croson* requires, it is doubtful that many of these challenges will be successfully thwarted.[147] Conversely, one can then expect to see a decrease in the number of voluntarily enacted plans. States will find the mandated process of documenting particularized instances of past discrimination arduous and costly.[148] Moreover, if states must tailor their plans such that only identified actual victims of discrimination can benefit, the effort will rarely be viewed as worthwhile.[149]

More significantly, however, is the effect this case will have on the economic development of racial minorities in this country. Government initiatives which mitigate racial discrimination in the labor market and business sphere and positively impact on the development of MBEs will be discouraged. While, admittedly, it is not the role of government to create a totally risk-free environment for minority businesses, it is certainly the responsibility of government to ensure that all of its citizens share

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146. *Id.* at 752.

147. *See id.* at 721 (O'Connor, J., plurality opinion); *id.* at 727 (majority opinion).

148. *Id.* at 727.

149. *Id.* at 728-29.

equitably in the economy.[150] The government must open doors for the traditionally excluded if for no other reason than self-interest; the more people included in the labor market the stronger the state's economy.[151]

One of the most important ways by which the government can fulfill its obligation to those traditionally excluded is by invoking its power of the public purse. How a state chooses to spend or not to spend its revenues impacts tremendously on all its citizens. While it is important for government to articulate a public policy of non-discrimination, it is far more effective for government to "put its money where its mouth is" and support its policy with actual dollars. Such government intervention, like vigorous enforcement of anti-discrimination laws, sends a strong message to the public that discrimination will not be tolerated, while simultaneously providing minorities with opportunities for employment where before none had existed. The *Croson* decision constitutes a disincentive for the enactment of state-sponsored affirmative action plans and will negatively impact on the economic development of racial minorities.[152]

Finally, it should be noted that the *Croson* decision has created a double standard for review of affirmative action plans.[153] Public employers who voluntarily adopt affirmative action plans will face challenges under the fourteenth amendment's strict scrutiny standard.[154] Private employers, however, will only be challenged under the lesser, restrictive standards of title VII.[155] Under the *Croson* standard, public employers will have to demonstrate a compelling governmental interest justifying the use of racial classifications.[156] To do so a municipality will have to present evidence, based on its own studies, etc., of particularized findings of prior discrimination.[157] Findings regarding societal discrimination will not be probative.[158] Assuming this requirement is met, a municipality will still have to demonstrate that its plan is narrowly tailored.[159] Thus, the plan will have to be flexible, meaning that it must contain a waiver provision which focuses upon actual victims of discrimination.[160] If a numerical goal is employed, then there must be a

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150. *See* U.S. CONST. amend. XIV, § 5. *See also* 42 U.S.C. § 1981 (1988).

151. *Croson*, 109 S. Ct. at 744 (Marshall, J., dissenting).

152. *See id.* at 744, 752.

153. *Id.* at 721 (O'Connor, J., plurality opinion).

154. *Id.*

155. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

156. *Croson*, 109 S. Ct. at 727.

157. *Id.*

158. *Id.* at 724.

159. *Id.* at 728.

160. *Id.* at 728-29.

reasonable correlation between the goal set and the relevant labor pool.[161] Comparisons based on population pools will not be considered probative.[162] Regardless of how well documented the discrimination, no plan will pass constitutional muster unless the municipality itself first considered nonracial alternatives.[163]

Under the standard articulated in title VII cases, private employers are able to articulate a broader array of interests as justification for their use of racial classifications.[164] They are not required to identify discrimination with the same specificity as public employers.[165] For example, they may adopt race-conscious measures to correct a gross underrepresentation of minorities in an historically segregated job classification, as was the case in *Johnson v. Transportation Agency, Santa Clara County, California.*[166] Under title VII, private employers are not required to admit that have they engaged in discrimination or point the finger at anyone else.[167] Instead, employers may use evidence that a gross statistical disparity exists between the number of minorities and non-minorities employed within their workforce as sufficient proof of discrimination.[168] Additionally, private employers will find it easier to demonstrate that their plans are narrowly tailored.[169] Numerical goals based on comparisons between the number of minorities in the workforce and the number of minorities in the general local population will be permissible.[170] While private employers will have to draft plans which are flexible, they will not be forced to limit the beneficiaries of their plans to actual victims harmed.[171]

VI. CONCLUSION

The *Croson* decision represents a dramatic step backwards in the struggle to combat discrimination.[172] The application of a standard of

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161. *Id.* at 725.

162. *Id.*

163. *Id.* at 728.

164. *See* Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 633 n.10 (1987).

165. *Id.* at 632-33.

166. *Id.* at 630.

167. *Id.*

168. *Id.* at 632.

169. *Id.* at 633 & n.11.

170. *Id.* at 631-32.

171. *Id.* at 638.

172. *Croson*, 109 S. Ct. at 740 (Marshall, J., dissenting).

strict scrutiny mandated by the Court[173] is certain to sound the death knell for state-sponsored affirmative action plans across the nation. The significance of this becomes more compelling when one realizes that, traditionally, public employers have provided a higher share of good jobs for racial minorities than the private sector.[174] Thus, for example, in the construction industry, minority contractors have had a disproportionate amount of their overall business in state-supported projects.[175] Yet, put in its proper perspective, the *Croson* decision, while damaging to affirmative action, is not all that surprising. The conservative mood of the Supreme Court makes clear that the eradication of racial discrimination is not a high priority, if, in fact, it is one at all.[176] The judicial branch has demonstrated, in no uncertain terms, its antipathy for civil rights issues.

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173. *Id.* at 721 (O'Connor, J., plurality opinion).

174. Havemann, *Profiles of a Shifting U.S. Workforce; More Minorities, Women in Government; Domestic Agencies Smaller*, Wash. Post, Aug. 17, 1989, at A25, col. 1. ("Minority group employment has grown to 27 percent of the federal work force, and virtually every minority group -- native American, Asian, Hispanic and black -- is present in proportionally larger numbers than in private employment . . . .").

175. *See, e.g., Discrimination in Atlanta's Business Sector "Deeply Rooted," Report Says*, Daily Lab. Rep. (BNA) No. 141, at A-6 (July 23, 1990).

176. *Croson*, 109 S. Ct. at 757 (Marshall, J., dissenting).